Matu Tugang (suing on behalf of themselves and 42 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Kampung Long Jaik, Sungei Seping, Belaga, 96900 Belaga, Sarawak) v Shin Yang Forestry Sdn Bhd & Ors

HIGH COURT (KUCHING) — BTU-21–03 OF 2009
RHODZARIAH BUJANG J
20 JUNE 2016

Native Law and Custom — Evidence — Documentary evidence — Maps — Admissibility of — Maker of maps not called — Whether makers of plaintiff's maps licensed or registered surveyors

Native Law and Custom — Land dispute — Native customary rights (NCR) over land — Issuance of forest licence over native customary land — Whether issuance of licence subject to plaintiff's NCR over land — Whether plaintiff discharged legal burden of proving usage of land prior to 1 January 1958 — Whether there was inherent probability that plaintiff had exclusive possession of land — Whether plaintiff could rely on maps produced during trial to prove his case — Whether defendants established their defence

Matu Tugang ('the plaintiff') had filed the instant suit for and on behalf of himself and 42 other villagers, who claimed that as Penans of Long Jaik they were entitled to native customary rights ('NCR') over a huge area near the Seping and Jaik rivers and which was demarcated in the maps attached to their amended statement of claim ('the land'). It was the plaintiff's case that his people, ie the Penans, who had roamed and foraged the land had acquired NCR in the land, and that the issuance of the forest licence to the first respondent by the second and third respondents was unlawful in that it infringed their NCR. Thus, by way of this suit the plaintiffs had sought, inter alia, a declaration that the issuance of the licence to the first respondent was null and void for want of extinguishment of the plaintiffs' NCR over the land. In response, the defendants adduced evidence to show that the plaintiff and his people were not foraging in the land before 1958 but had actually settled in the land in the late 1960s.

Held, dismissing the plaintiff's claim with no order as to costs:

(1) The crucial issue in this case was whether the plaintiff had discharged the burden of proving that he and those he represented had been using the land prior to 1 January 1958. The evidence adduced showed that almost

the whole area claimed by the plaintiff would fall within the Belaga Protected Forest First Extension, which was constituted vide notification in the Sarawak Government *Gazette* on 18 July 2002. The First Schedule of the Belaga Protected Forest notification was relevant as it described the area declared as the Protected Forest, whilst the Second Schedule listed the longhouses whose inhabitants had foraging or usufructuary rights over the said area. The plaintiff's longhouse was obviously not mentioned in that Schedule and in the face of such evidence it would not be right to grant the declaration sought by the plaintiff for such an order would directly obliterate the written and acknowledged rights of the inhabitants of all the 31 longhouses listed in the Second Schedule. In the circumstances the plaintiff's competing claim should lie with the Native Court. For present purposes, the evidence disclosed in the Suhakam report showed there was no such settlement in the land when the Oxford Expedition was undertaken in 1955 (see paras 18 & 29–31).

(2) Further, there was an inherent probability that the plaintiff had not had the exclusive possession of the area claimed to put in place a 'measure of control preventing strangers from intrusion or interference' as was held in *Madeli*'s case, to be entitled to the declaration sought that he and those he represented had NCR over the land. In the circumstances, the plaintiff and those he represented had failed to discharge the burden of proving that they had been using the land prior to 1 January 1958 (see paras 32 & 36–37).

(3) In the event the plaintiff had discharged the legal burden of proving his people had acquired NCR then he and his representatives would have acquired NCR over only a smaller acreage than the land they claimed. The plaintiff's maps would be rejected because the ones who had carried out the ground survey and the ones who drew the maps were not called as witnesses in the trial. Further, the makers of the plaintiff's maps were not licensed or registered surveyors under the Land Surveyors Ordinance 2001. Therefore, the maps produced by the plaintiff at the trial could not be relied on. On the other hand, the aerial photograph taken by the defendant's witness, an assistant surveyor with the Department of Lands and Surveys, showing the land to be a primary forest was more reliable (see paras 38, 40–41 & 44).

[Bahasa Malaysia summary

Matu Tugang ('plaintif') telah memfailkan guaman in untuk dan bagi pihak dirinya dan 42 orang kampung yang lain, yang mendakwa bahawa sebagai orang Penan Long Jaik mereka berhak kepada hak adat anak negeri ('HAAN') terhadap satu kawasan besar berhampiran sungai Seping dan Jaik yang mana ditandakan dengan jelas di dalam peta dilampirkan bersama dengan penyata tuntutan terpinda mereka ('tanah'). Adalah kes plaintif bahawa orangnya, iaitu Penan, yang merayau dan mencari makanan di atas tanah telah memperoleh

HAAN ke atas tanah, dan bahawa pengeluaran lesen perhutanan kepada responden pertama oleh responden kedua dan ketiga adalah menyalahi undang-undang dan dengan itu melanggar HAAN mereka. Oleh itu, dengan guaman ini plaintif telah memohon, antara lain, satu deklarasi bahawa pengeluaran lesen kepada responden pertama adalah batal dan tidak sah kerana mahu menghapuskan HAAN plaintif ke atas tanah. Dalam menjawab, defendan mengemukakan keterangan untuk menunjukkan bahawa plaintif dan orangnya tidak mencari makan di atas tanah sebelum 1958 tetapi telah menetap di atas tanah pada akhir 1960.

Diputuskan, menolak tuntutan plaintif dengan tiada perintah terhadap kos:

(1) Isu penting dalam kes ini adalah sama ada plaintif telah melepaskan beban membuktikan bahawa dia dan mereka yang diwakilinya telah menggunakan tanah sebelum 1 Januari 1958. Keterangan yang dikemukakan menunjukkan bahawa hampir seluruh kawasan dituntut oleh plaintif akan jatuh dalam Hutan Lindung Belaga Perluasan Pertama, yang mana ditubuhkan melalui pemberitahuan dalam Warta Kerajaan Sawarak pada 18 Julai 2002. Jadual pertama pemberitahuan Hutan Lindung Belaga adalah berkaitan kerana ia menerangkan kawasan yang dideklarasi sebagai Hutan Lindung, manakala Jadual Kedua menyenaraikan rumah panjang yang mana penduduknya telah mencari makan atau mempunyai hak usufruk terhadap kawasan tersebut. Rumah panjang plaintif ternyata tidak dinyatakan di dalam Jadual dan berdasarkan keterangan sebegitu ia adalah tidak betul untuk memberikan deklarasi yang dipohon oleh plaintif kerana perintah sebegitu akan secara terus menghapuskan hak bertulis dan diiktiraf semua penduduk 31 rumah panjang yang disenaraikan dalam Jadual Kedua. Dalam keadaan tuntutan bertanding plaintif sepatutnya terletak pada mahkamah adat. Untuk tujuan ini, keterangan yang didedahkan dalam laporan Suhakam menunjukkan bahawa tiada pendudukan atas tanah apabila Ekspedisi Oxford dijalankan pada 1955 (lihat perenggan 18 & 29–31).

(2) Selanjutnya, terdapat kemungkinan inheren bahawa plaintif tidak mempunyai pemilikan eksklusif terhadap kawasan yang dituntut untuk meletakkan 'measure of control preventing strangers from intrusion or interference' seperti yang diputuskan dalam kes *Madeli*, untuk memberi hak kepada deklarasi yang dipohon bahawa dia dan mereka yang diwakilinya mempunyai HAAN terhadap tanah. Dalam keadaan itu, plaintif dan mereka yang diwakili gagal untuk melepaskan beban membuktikan bahawa mereka telah menggunakan tanah sebelum 1 Januari 1958 (lihat perenggan 32 & 36–37).

(3) Sekiranya plaintif telah melepaskan beban undang-undang membuktikan orangnya telah memperoleh HAAN kemudian dia dan

wakilnya akan memperoleh HAAN terhadap hanya atas keluasan kecil dari tanah yang mereka tuntut. Peta plaintif akan ditolak kerana orang yang menjalankan kajian tanah dan orang yang melukis peta tidak dipanggil sebagai saksi dalam perbicaraan. Selanjutnya, pembuat peta plaintif bukanlah juruukur berlesen atau berdaftar di bawah Ordinan Juruukur Tanah 2001. Oleh itu, peta yang dikemukakan oleh plaintif tidak boleh disandarkan. Sebaliknya, foto udara yang diambil oleh saksi defendan, pembantu kanan juruukur di Jabatan Tanah dan Ukur, menunjukkan tanah adalah hutan primer adalah lebih dipercayai (lihat perenggan 38, 40–41 & 44).]

Notes

For cases on native customary rights (NCR) over land, see 10(1) *Mallal's Digest* (5th Ed, 2015) paras 786–787.

Cases referred to

Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2013] 5 MLJ 149; [2013] 6 CLJ 805, FC (refd)

Buassan & Ors v Entrep Resources Sdn Bhd & Ors Suit No KCH-22–199/10 of 2011 (unreported), HC (refd)

Director Of Forests, Sarawak & Anor v Balare Jabu & Ors and another appeal [2012] 7 CLJ 685, FC (refd)

Director of Forest, Sarawak & Anor v Tr Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, the occupiers, holders and the claimants of native customary rights (NCR) lands situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) [2014] 1 MLJ 161, CA (refd)

Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427, HC (refd)

Nicholas Mujah Ason & Ors v Hock Tong Hin Sawmill Co Bhd & Ors [2012] 1 CLJ 749, HC (refd)

Sanabung ak Sampai & Ors v Hydroflow Sdn Bhd & Ors [2014] 7 MLJ 429, HC (distd)

Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)

Legislation referred to

Land Surveyors Ordinance 2001
Public Authorities Protection Act 1948 s 2(a)
Rules of Court 2012 O 15 r 12(1)

See Chee How (Baru Bian Advocates & Solicitors) for the plaintiff.
Jagjeet Kaur Sandhu (Awang, Lai, Sandhu & Co) for the first defendant.

Saferi Ali (Senior State Counsel, Attorney General's Chambers) for the second and third defendants.

Rhodzariah Bujang J:

[1] The Penans are one of the indigenous tribes or natives of Sarawak. Any self-respecting Sarawakian would know that the Penans led a nomadic lifestyle, deriving their livelihood and sustenance from the jungles and forest where they roamed in the northern region of Sarawak. It is common enough knowledge too that the modern day Penans have all but abandoned that nomadic lifestyle and have embraced a more settled existence by living in longhouses.

[2] That is as far as the general information on the Penans goes and I have been privileged, in writing this judgment to have a deeper insight on the Penans not just from the evidence of the Penans themselves but from a rather unlikely source, a Professor on Anthropology from United States of America, ie Dr J Peter Brosius ('Professor Brosius') who was assisted by Professor Nathan P Nibbelink ('Professor Nathan') on transplotting the data gathered from his research on the Penan into maps produced at the trial. I also derived much assistance from Mr Jayl Langub, a former state administrative officer of Belaga who wrote ten articles on the Penan and who is a Lun Bawang, another one of the indigenous tribes in Sarawak and from a report by the Human Rights Commission of Malaysia also known as Suhakam on 'The Penans of Ulu Belaga: Right to Land and Socio-Economi Development' ('the Suhakam Report'). The above-named persons have all testified as witnesses for the plaintiff, Matu Tugang, according to the intitulement of the writ and statement of claim who represents 42 other villagers from his longhouse at a place named Long Jaik, situated at the Seping River of Belaga, a district in the seventh Division of Sarawak. He has sued, for himself and his 42 other villagers, Shin Yang Forestry Sdn Bhd ('the company') who has been given a large swathe of land where they claimed to have long foraged and roam for their livelihood and sustenance and which the company has turned into an oil palm plantation. The Director of Forests, Sarawak ('the Director') who granted the planted forest licence to the company and the State of Government of Sarawak have for good measure, been included as the second and third defendants, respectively in this action of theirs where the prayer is, inter alia, for a declaration that they have native customary rights over the area claimed in the map marked as 'M' attached to the statement of claim. The said pleading was amended on 5 June 2015 wherein another map marked 'P' demarcating the area claimed has been included.

REPRESENTATIVE ACTION

[3] I wish to say at the outset that there is nothing wrong with the plaintiff's capacity to represent his fellow villagers in this action as raised by the second and third defendants' counsel, Mr Saferi Ali. *Firstly*, it cannot be denied that the requirement of a representative action as provided in O 15 r 12(1) of the Rules of Court 2012 is satisfied in that the plaintiff and these 42 other villagers have the same interest which is to claim native customary rights over the area demarcated in the maps attached to their amended statement of claim. They all have a common interest as well as a common grievance over the issuance of the licence to the company by the Director and a declaration to that as pleaded would benefit all of them (see *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427).

[4] *Secondly*, although the plaintiff himself admitted in his evidence that there are altogether 87 claimants of his longhouse (at lines 16–18 of p 310 of the notes of proceedings) however there is no evidence adduced that there were other inhabitants of Long Jaik who were against this action being filed. In fact the evidence given by plaintiff at p 290 lines 15–22 of the notes of proceedings is that all the inhabitants of his longhouse, numbering 200 plus at the time of his evidence agreed in a meeting that this action be taken and I would not be handicapped by the mere stating of '42 other proprietors, occupiers, holders and claimants at Kampung Long Jaik' in the intitulement of the amended statement of claim to make the declaration sought and to re-word the same to include all the inhabitants of Long Jaik — this I would do if I allow the claim of the plaintiff, of course. The evidence I mentioned above therefore allows me to distinguish the decision of *Sanabung ak Sampai & Ors v Hydroflow Sdn Bhd & Ors* [2014] 7 MLJ 429 because there was evidence in that case that there were other villagers from other villages bordering the area claimed by the plaintiffs who did not support the action.

HISTORICAL DATA

[5] I must honestly admit that to a large extent the historical data presented by both Dr Brosius and Mr Jayl Langub and compounded by the evidence of Matu Tugang ('PW4'), his father, Tugang Sugun ('PW5'), Avun Sugun ('PW6') a fellow Penan as well as a supporter of theirs, Imang Jok ('PW7') who is from another indigenous tribe in Sarawak ie Kayan was overwhelming to say the least. However, unlike the other native customary rights cases I have heard involving the Dayaks ie the Ibans and Bidayuhs, the Penans in this case were more fortunate in that there has been a lot of researches done on them not just by private researchers but also ones sponsored by or sanctioned by the state government, which I reiterate is the third defendant in this case. I will in the course of this judgment refer to these other researchers as well which have been

quoted by the witnesses. For example, Professor Brosius's made mention of these state-kept historical records in his witness statement ('WSPW1') which runs into 442 pages inclusive of all the annextures. In one of the annextures, it is even mentioned that the state government had a Minister appointed to take charge of the Penans.

[6] Therefore, unlike the native customary rights claims by the Dayaks who had to adduce evidence of their existence of their customary practice on the land claimed through oral testimonies of local experts, that of the Penans here have been largely documented and the reliability of the information contained therein, I must also readily admit to be almost beyond reproach given that they were kept in the archives of the state government.

[7] However, it is not the admittedly daunting task of repeating these historical records that prevent me from reproducing these data in the judgment but rather the practical consideration that the issues governing the dispute herein are basically simple ones. This I say after examining the evidence adduced by the company who have called three Penan leaders or Tuai Rumahs, including one from Long Peran which is situated in the same general area as the plaintiff, ie the Seping River. These Tuai Rumahs have collectively testified that the Penans of Long Jaik have no rights over the land claimed by them — those from Long Peran do. The issues for my determination are:

(a) whether the Penans of Long Jaik are entitled to the area claimed in map P annexed to the amended statement of claim; and

(b) if they do, the size of the area to be declared as their native customary rights.

ENTITLEMENT

[8] I would start my consideration on this issue by endeavouring to summarise the evidence of Professor Brosius whose evidence was not only based on his own personal record of the data he collected during the three years he spent living amongst the Penans of Long Jaik but also those obtained from the archives of the state government such as that contained in the Sarawak Government *Gazettes* which will be referred to in this judgment as well.

PROFESSOR BROSIUS

[9] Professor Brosius received his doctorate in anthropology from the University of Michigan in 1992 and at the time of his testimony, a Director of Centre for Integrative Conservation Research at the University of Georgia. The culmination of his three years research on the Penans is encapsulated in a paper titled 'The Penans of Belaga: Considerations for Development' which was

submitted to the State Government's Planning Unit ('SPU') whereas his field reports upon which the said paper was based were periodically submitted to the Sarawak Muzeum. His research was actually with the approval and one could even say, at the behest of the state government who was at that material time developing the Pelagus/Bakun Hydro-Electric Project and under the supervision of the Sarawak Muzeum, Professor Brosius was given specific terms of reference (attached to Professor Brosius's curriculum vitae marked as exh P05) for his research as follows:

> Terms of References.
>
> Background Information on Ethnic Groups Affected by the Pelagus/Bakun HydroElectric Project.
>
> The investigations (study of relevant literature and field investigations) should cover the following aspects:
>
> – assessment of economic activities of these groups, especially with respect to the importance of rice cultivation.
>
> – description of the system of social organization.
>
> – identification of the effects of social organization on economic performance.
>
> – analysis of relations to other ethnic groups of the area.
>
> – proposal of options for their future agricultural development.
>
> – recording of oral tradition and the migrations of these peoples.
>
> (Knowledge on these groups is needed for resettlement planning, therefore, recommendations should be presented mainly for this purpose).

[10] Professor Brosius did not however received any financial funding from the State Government but from four sources outside the country, ie the National Science Foundation, Fullbright-Hays Dissertation Fellowship, Social Science Research Council and Louis SB Leakay Foundation. In 1992, Professor Brosius returned to conduct research on the nomadic Penans in Upper Tutoh River in the Baram District and from the years 2004–2006, he furthered his research at the Pulong Tau National Park. However, it is his research at Long Jaik which is the relevant focus of my judgment. Professor Brosius testified that during the research period in Long Jaik he learned the language of the Penans. The plaintiff, Matu Tugang was also his research assistant and he established, he said a close relationship with not only Matu Tugang but Matu Tugang's father, Tugang Sugun who was his primary source of information. He also worked with Matu Tugang's grandfather, Sugun Uwing who passed away in May 1987. Professor Brosius mentioned that his other source of information is the Sarawak *Gazette* (as stated by me earlier), a remarkable source going back to 1870's, was how he described it and he also referred to the number of articles published by the Sarawak Muzeum on the

Penans as well as the records kept by the Belaga District Office which Professor Brosius said he hand-copied because there was no photocopying service available in Belaga at that time. In my estimation, the end product of the Professor Brosius's three years research ie his paper with the long title that I mentioned earlier and submitted to the State Planning Unit would be a reliable evidence to rely on because it was not only a by-product of his personal experience with the Penans of Long Jaik but of the other sources of data mentioned by him as stated above and that includes Jayl Langub's dissertations on the Penans as well. In Brosius's own words at pp 10–11 of the notes of proceedings:

> The thing that I would like to stress is that during the research, no single data source is comprehensive. It requires triangulation of data from multiple sources, that include both triangulation between different accounts that I would for instance I will collect migration histories from Sugun and I will go to Long Tangau in the Plieran River and collected other migration histories and go to Long Wat and collect other migration histories; you line them up and try to look at them to get a bigger picture.
>
> The same with genealogies, the same with collecting river names and locations but also not only triangulating within the Penan community but also trying triangulating with reference to published sources in the Sarawak Gazette or archival sources, etc.

The Penans of Belaga

[11] Professor Brosius's study on the Penans was preceded by one Professor Needham who studied them in the 1950s and divided the Penans into two groups — the Western and Eastern Penans. Professor Brosius adopted this definition and the Penans of Long Jaik comes under the Western group. The Eastern Penans according to the definition used to live east of the Baram River in areas such as Tutoh, Patah, Pelutan, Apoh, Upper Akah, Selaan and Selungo whilst the Western group are all those in the Belaga District and inhabited areas such as Long Belia, Long Tikan, Long Ba Purau, Long Jekitan and Long Beku all of the Silat River watersheds. The plaintiff is from a sub-group of the Western Penan known as the Penan Geng (also spelt as Gang) and Penan Apat. The Penans, and this I learned from the undisputed literature adduced at the trial and the evidence of the plaintiff and his witnesses, named themselves after the rivers where they settled, temporary or otherwise. Those living at the Apat River are therefore known as the Penan Apat and those living at the tributary of the Keluan River ie Geng River become known as the Penan Geng. Those who eventually settled near the Jaik River became known as the Penan Jaik.

[12] Traditionally, said Professor Brosius, the Penans, Eastern or Western, sustained themselves through sago production and hunting. Sago, the main source of the Penans' carbohydrate intake and staple food is harvested from the

sago palms and the Penans also eat the young shoots of the sago palms. Even during Professor Brosius stay with them, the Penans still hunted with blow pipe and their preferred games were wild boar (or pig) as the Professor described it) and a typical hunting trip involved a gang of 2–4 hunters and their dogs. A photograph of the plaintiff's father with his blow pipe and his catch for the day, a barking deer appears at p 17 of the Professor's witness statement. That of him splitting the sago trunk is at p 18 of his witness statement. Despite a nomadic lifestyle, the Penans contended the plaintiff have an established system of land tenure and this has been explained in both Professor Brosius's oral testimony and in his earlier writings. He practically scoffed at the notion that the Penans, by virtue of their nomadic lifestyle roamed aimlessly about in the jungle. On the contrary, Professor Brosius asserted, the Penans have an established system of land usage called 'molong' which is a practice of claiming and an ethos of stewardship over resources. This system of resource management is better explained by the Professor in his dissertation reproduced at pp 173–514 of exh P5 as follows:

> A concept of key significance with regard to trees is that of molong, to preserve or foster. This generally applies to fruit trees of various types, to sago clumps, or, for instance, to large trees which are suitable for boat building. In the case of fruit trees, whether these are molong by an individual or by the community is dependent on the particular species: those of which only the fallen fruit is harvested, such as Durian (Durio zebethinus) and several species of wild Mangifera are community owned, while species of which fruit is harvested while still on the tree are individually owned.
>
> When travelling in the forest, Penan not infrequently come across fruit trees or sago clumps which have never been discovered or claimed. They will then mark it in some manner, thus reserving it for future harvest or use. As men are in the forest more, and cover greater distances, they are most likely to discover such trees. Often however, if women or children are present, Penan will playfully take 'dibs' on a tree, older persons usually deferring to children. Even young children actively claim trees and, by adulthood, may have claimed several dozen fruit trees and sago clumps. A person may mark that tree, though this is not absolutely necessary. The point to stress is that throughout the forest, over large areas, there exists for any particular community a collection of thousands of trees and sago clumps which particular individuals or households are monitoring. Seen temporally, throughout their lifetime any particular individual, beginning in childhood, may molong several dozen fruit trees and sago clumps. The molong system thereby does two things. First it serves as a way to monitor information on the availability of resources over vast tracts of land. Secondly, it prevents the indiscriminate cutting of fruit trees and sago, resources which might otherwise be seriously depleted. It is not so much a system of ownership as a means of monitoring resources and enhancing their long-term availability.

[13] Dr Needham in his own dissertation at p 70 of exh P10 confirmed this method of stewardship over land — the typical 'Western Penan Custom of staking claims to sago palms' as he described it and continued as follows:

> The claimant may put his mark on as many as twenty palms if he wishes, and other members of the group will not be angry at his claim, but will merely ask permission to cut what they need. He readily gives permission but 'two of the palms are really his, he will keep them, and no one may cut them down'. To cut down even one of many palms without asking the owner's permission is an offence, and to work one that 'really' belongs to the claimant without his agreement is an offense sure to lead to quarreling and discord within the group sever enough to cause the sort of quarrel-fission that has been described in Ch. 3.

[14] The Penans also gave names to fruit trees growing wild in the jungle such as durian, langsat and rambutans after the person who first spotted the tree or a deceased buried near it and with molong rights over the trees passed from one generation to the next.

[15] Professor Brosius of course in his evidence and particularly in his writings provide more details than what I reproduced above and I meant no disrespect to either his learnings or his obvious love and passion for the subject of his dissertations by not alluding to them further or go the length and breadth of his academic writings and/or testimony in this judgment. I have picked, in a way I think best what is relevant to the claim herein and the next area which deserves my attention now is the settlement sequence or history of the Penans of Long Jaik represented by the plaintiff.

THE SETTLEMENT

[16] First I must mention again the location of the area claimed as native customary rights by the plaintiff as pleaded by him in the statement of claim. It is delineated with red line in the maps marked 'M' and 'P' attached to the amended statement of claim and inside that line are three rivers — Sungai Maleh, Sungai Seping and Sungai Jaik. From the documented evidence of not just that of Professor Brosius but more importantly, the Sarawak Government *Gazette* itself, the Penan Geng and Penan Apat have been sighted in these areas (see for example pp 8–9 and 11 and p 19 of exh P8). Why I need to mention Penan Apat will be made clearer in the next paragraph of this judgment. The inter-relation between the two groups of Penans is explained in an article by Johnnes Nicolaisen from the University of Copenhagen titled 'The Penan of the Seventh Division of Sarawak: Past, Present and Future' which was published in the Sarawak Government *Gazette* on the 30 April 1980 (see Tab I to exh P4).

[17] The writer said in the article that the oldest known group of Penan in the seventh division (ie the Belaga District) according to some people (he did not name his source (s)) were the Penan Apat, so named because they lived at the Apat River which is a tributary of the Seping River. And sites of the camp (for want of a better word to describe their temporary abode — temporary

because of their nomadic lifestyle) are called *lamins* or *la lamin*. The Penan Lusong are descended from the Penan Apat before they split, moved to Geng in the Linau River system and become known as the Penan Geng. This Penan Geng further split into two groups of Penan Belaga, two groups of Penan Plieran, two groups of Penan Seping and the Penan Long Wat, he further said. The reasons for the splinter groups (my words, not his) were because the Penans have 'grown in number so that they had to split up in order to subsist on hunting and collecting'. The other reason the writer gave was 'the serious fighting between the Kayan and the Kenyah' with possibly the army of the Rajah. Because of the unrest, the Penan became scared and fled into the jungle to live in minor groups. The third reason the writer gave is when there was a leadership tussle which led the gang leaders to form their own group.

[18] In an article written by Jayl Langub in the Sarawak Government *Gazette* on the 30 April 1973 (Tab G of exh P4), a map showing the distribution of Penan settlements was produced and 'The Penan Gang, Long Jaik (Belepeh/Seping)' is one out of eleven groups of Penans mentioned and it is one of the seven sub-groups belonging to Penan Geng. So, the inescapable conclusion from all these Sarawak State Government's historical documents is that the Penans of Long Jaik do exist and have settled in the vicinity of the Seping and Jaik Rivers. I purposely drew that conclusion from the aforesaid documents and expressly mentioned the Sarawak Government *Gazettes* because the defendants in this case, particularly the company has questioned the credibility of Professor Brosius. This is because of the Professor's own admission made in crossexamination by the company's counsel, Ms Jagjeet Kaur Sandhu ('Ms Jagjeet') that during his stay with the Penans of Long Jaik, he married the plaintiff's cousin named Kaleh Ingan. However, Kaleh has according to Professor Brosius in his cross-examination by Mr Saferi Ali, remarried after he left Long Jaik. The Professor was also candid of his close relationship with Sugun, the plaintiff's paternal grandfather and his attachment to the Penans of Long Jaik. In fact I observed that he was rather emotional when relating the death of Sugun in his testimony in court. The Professor's evidence was therefore bias, submitted Ms Jagjeet, because he has a vested interest in the outcome of this case. Notwithstanding the apparent personal interest of the Professor which I cannot discount because it was borne out of that liaison and his apparent attachment to the plaintiff and his family but to be fair to him he has in his doctoral dissertation and in his evidence before me quoted from the eminent writers and the historical documents that I have in turn mentioned above. The issue, I reminded myself is simply whether the plaintiff has discharged the burden of proving that he and those he represents from the Long Jaik community have native customary rights 'over the area of lands or forests covering the whole region of Sungai Seping, Sungai Jaik and the upper reaches of Sungai Maleh which are in close proximity with the plaintiff's village, Long Jaik', as pleaded by him in para 4 of the statement of claim. To be able to stake a native customary rights claim over the that huge

area, the first hurdle the plaintiff must cross is to prove that his people (the plaintiff was at the time of the filing of the writ and the trial the headman of Long Jaik) have been using the area claimed for their livelihood and sustenance before 1 January 1958 — this in accordance with the express provision in s 5(1) of the Land Code which provides that '... no recognition shall be given to any native customary rights over any land in Sarawak created after the first day of January, 1958 ...'. Further, the proviso the said s 5, ie 5(2)(ii) provides as follows:

> (ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

[19] Therefore that date, ie first day of January 1958 is the cut-off date for acquisition of native customary rights by the natives in Sarawak.

Genealogical evidence

[20] The plaintiff pleaded in para 4.4 of the statement of claim that his people are the eighth generation who had roamed and foraged this area claimed by them and that this area 'are very defined areas as the other areas were occupied and/or roamed or foraged by other groups of Penans' meaning that each group of Penans have their own roaming or foraging area. It is the plaintiff's case that his ancestors have been roaming and foraging the area claimed which he and his people continued till this day but which activities have been hindered or compromised by the activities of the company. Professor Brosius has in both his evidence and in his writings traced the leadership lineage of the Penans of Long Jaik which is passed from father to son and is pleaded at para 4.3 of the amended statement of claim, starting with Poven Teguh. Poven's son who took over from him was Daeng, then to Senobeng, to Uwing, to Sugun and to Tugang, the plaintiff's father. This lineage is not only stated in the witness statement of Professor Brosius and Jayl Langub but also documented in the Suhakam report (exh P2) where written briefings made by Jayl Langub (annexture 3) and by Professor Brosius (annexture 5) are attached.The plaintiff, according to both the evidence of the plaintiff and Professor Brosius and pleaded in the said para 4.3, was born at the upper reaches of Sungai Seping in 1956. I have no cause to disagree that these named persons are so descended but the crucial issue is again whether all or some of them were there before 1958.

[21] They were not, claimed the witnesses called by the company who were at the time of the trial the headmen or Tuai Rumah of their own subgroup of Penan Geng ie Madai Salo of Long Luar ('DW7'), Lien Bueh of Long Menapa ('DW8') and Duren Luhat of Long Peran ('DW9'). Their common evidence as deposed at paras 5–6 (for TR Lien Bueh and TR Duren Luhat) and para 4 (for

TR Duren Luhat) of their respective witness statements is that the Penans of Long Jaik were roaming the area of the Dapoi River of Upper Belaga until the 1960s. Following the disagreement and attack from the Badengs, Sugun requested permission from TR Madai's father ie Salo to settle around the Long Luar area which was refused and it was then that the Penans of Long Jaik moved to the Seping River after the then headman of Long Peran, Anyup, ie TR Duren Luhat's grandfather gave Sugun permission to settle there. The Penans of Long Jaik then settled at the mouth of the Jaik River but roamed around in the area before settling at the present location of Long Jaik. Thus, said these witnesses, the Penans of both Long Peran and Long Jaik continue to share the communal land in the Seping Rivers to roam, forage, hunt and fish. But all is not well between them. There is friction between the two communities over their territorial domain and this was readily admitted by the plaintiff himself at p 302 lines 20–23 and at p 303 lines 10–13 of the notes of proceedings. What also need to be mentioned is that when the plaintiff was asked this question at p 303 line 1–2 of the notes of proceedings, 'is it correct to say that Sugun led his people to the Seping River in the late 1960s?', his answer at line 3 was an unqualified 'Yes'. Then, as highlighted by Ms Jagjeet in her written submission at p 62 thereof, from the evidence of Arun Sugun ('PW6'), who is an uncle of the plaintiff, there is a photograph of Tugang, the plaintiff's father taken by Ian Urquhat. That photograph appears at p 151 of exh P2 and it is part of annexture ie Professor Brosius's briefing and from the notation on the photograph it was taken at Long Tenanga, Dapoi, 'ca 1950'. The Dapoi River is as seen on the map produced at the trial, some distance away from the Seping River. This map is at p C6-4 of exh P4 which in a report titled 'Final Report Social and Environmental Impact Assessment for the Murum Hydro-Electric Power Project, Sarawak Part II: SEIA for the Murum Resettlement (Contemporary Ethnography)' henceforth referred to as the 'Final Report' by me. This Final Report was produced under the aegis of the State Planning Unit of the Chief Minister's Department and from its title there is obviously a Part I which was not evidence before the court. I would be making further reference to this Final Report again after this. To appreciate the distance between the Dapoi River and that of the Seping, I would just point out that it is not even reflected in map 'M' and 'P' attached to the plaintiff's original and amended statement of claim, respectively — that is how far it is.

A B C D E F G H

THE FINAL REPORT

[22] Coming back to the final report, it is authoritatively stated in the opening paragraph of section 1 ie Background to the Contemporary Ethnography that the study was commissioned by the Sarawak Government as part of the Social and Environmental Impact Assessment for the Murum Hydroelectric Power project to gather information about the situation on the ground concerning the affected people. The affected people being studied here was of course the Western Penans as is made clear in section 2 with the heading

I

'Penan History and Cultural Heritage'. This final report was produced by the second and third defendant's witness, Mr Buckland ak Bangik ('DW3') who was at the time of the trial the Deputy Director of State Planning Unit. He did not however produced the final report during his examination-in-chief — what he did was annexed only the *front cover* of the final report to his witness statement and certain appendixes to the final report ie appendix 3 which is the list of claimants from Long Wat and appendix 4–8, which contained information on the Penans not relevant to this case. The final report was tendered during his cross-examination by Mr See Chee How for the plaintiff.

[23] What this final report did was to validate the studies conducted by Professor Brosius and Jayl Langub for at section 6.1 under the title 'Tenure and Territory' which is a sub-paragraph of section 6 titled 'Community Territories and Rights', this is what is stated in p C6-1 and which I am moved to reproduce in toto below:

> SEIA for the Proposed Murum Hydroelectric Project Part II Comtemporary Ethnography
>
> 6. COMMUNITY TERRITORIES AND RIGHTS
>
> 6.1 Tenure and Territory
>
> General information on Penan concepts of the land, tenure, and territory can be found in works by Brosius (1987, 1992 and 2001), Langub (2004) and Khoo (SESCO 1994) and is applicable to all communities. *What is important to note is that Penan have a strong sense of bonding with their territory. The latter is called tana' pengurip (tana' = land, forest, all the world; pengurip: from urip = life; literally, then, 'lifeworld')*.
>
> As one of the earliest occupants of this country and intimately tied to the landscape, the Penan feel insulted when told they have no native customary rights to land, because their ancestors did not cut the forest to create such rights; that they are mere squatters on the land. The Penan ancestors did not cut the forest to create rights because it was not their adet to do so, it was their adet to leave trails connecting ancestral burial sites, old camp sites and to resources such a biral uvud (sago groves), birai wai or birai laka (rattan stands), kayeu' tanyit (honey trees), tajem (trees that supply the poison for darts) that they molong in various parts of their tana' pengurip.
>
> Every community has a specific area that it 'belongs' to, and over which it has recognized rights of ownership and use (Brosius 1987: 34). The basis for historical claims to land is ancestry and genealory, which is intimately related to a group's migration and habitation histories. As Brosius (1986) eloquently recorded, Penan history is written in the landscape. Where an ancestor walked, that is the basis for claims to land. It is even stronger when a known ancestor has left traces (uban) on the land: a sago grove here, an old encampment there, a burial site, and pathways and trails everywhere. These are the sites of a collective social memory; recorded in placenames and communicated through stories. They are the evidence that the

ancestors walked and worked the land and have left it (the land) behind for them to use.

The landscape is well walked and well worked over and people know not only where their claims to the land are, but also the locations of the land of others there. This is truly local knowledge of a depth and breadth that is impossible for outsiders (to the Penan) to master. As they travel up and down the river, they monitor the conditions of their lands and resources and are acutely aware which ones they have the right to harvest and which ones they cannot. There is also a communicative element to all of this, with people monitoring other people's resources and informing them of new developments (along the lines of 'your durians are ready for harvest'). (Emphasis added.)

[24] The final report also included an interview on 25 April 2010 with Penghulu Pau Tului at p C6-3 which confirmed the Penan's customary occupation of land called the la lamin, tana pengurip and the other concept called 'mulong' ie preservation of forest resources such as wild sago and rattan for the future. The transcript is reproduced below:

In the past we Penan led a nomadic life, moving from one place to another within particular river systems or area. In our migration, each band would leave traces of occupation through old campsites (la lamin). The area encompassing these old campsites has boundaries with areas of other bands.

We call the area that we occupy tana' pengurip , that is, the area that provides us our livelihood. In the tana' pengurip we molong (conserve for the future) wild sago, rattan, fruit trees, ketipe (wild rubber), various species of trees that are useful to us such as tajem trees that produce poison for our blowpipe darts, gaharu, trees to make blowpipes, build boats and houses, for coffins and other uses.

In the tana' pengurip we leave old campsites as we migrate. Since the time of our ancestors, we have created numerous old campsites called la lamin. In these old campsites are found various fruit trees that our ancestors ate. These are traces of our life journey and evidence of our occupation and rights of access to the area and resources therein. As the tana' pengurip was first created by our ancestors, and we the descendants are the inheritors, we call this land tana' ukun tepun (land of our great grandfathers) or tana' puu' (ancestral land) or tana' asen (customary rights land). This is how we Penan create rights to land according to our adet (custom).

In our past constant migration from one place to another, we used resources sustainably, avoiding wastage. After we settled down, part of our tana' pengurip have been cultivated and the other part conserved to cater for the needs for future generations, our children and children's children.

(Interview with Penghulu Pau Tului, April 25, 2010)

[25] What actually helps me to resolve this issue is Professor Brosius own evidence presented at p 29, chapter 7 to his witness statement where it is stated, in point form the pre-1958 movement of the plaintiff's grandfather Uwing and his band of men (which of course include women and children). It is in point

form because Professor Brosius gave a slide presentation of these points from the various chapters in his witness statement and which was then recorded verbatim in the notes of proceedings. The point form I mentioned above appears at pp 49–50 of the notes of proceedings which I would now reproduce below:

> Around 1920 then, again Uwing's group was in the middle Plieran, the Menapun, the Menavan and the Pejunan at this area, around the Luar, just to the north to the Plieran River but very close to the headwater of the Jaik River and the Seping River. In the early to mid-1920s, they moved into Seping and for many years they remained in Seping, Igam, the Mali. They moved briefly into tributaries of the Belaga River and then back to the Mali and Seping in 1927. They then went back to the Mali where shown in the settlement sequence, Sugun married Tokom. In the settlement sequence again it shows they moving around the Seping, the Mali and the Belaga and Dapoi River as they coming back to the Seping, the Mali and the Jaik. In 1936, they met Kapit District Officer Hudden in the Belaga River and just a few years later, that Penan Benalui group, there were number of deaths and then they split away and moved back to the Plieran. In 1950, they met Ian Urquhart in the ulu Dapoi where these pictures were taken. They then returned to the Seping, moved between the Seping, Mali and Belaga River in *1950s*.

[26] Given the normadic lifestyes of the Penans, the moves described above are indeed probable. Professor Brosius then continued his narrative of the movements further at p 50 lines 9 until lines 2 of p 51 of the notes of proceedings:

> Here we have Needham Dissertation talking about how the Penan Geng moved northward as I describe independently moved north in the Plieran where in the life time of the present elder, Japi, they split again. The group known today as Penan Geng went north under Japi, while the remainder went into the Lua and became two groups under Lawing and Usang and etc. *The Penan Geng under Japi moved during a period of several years from Plieran to the Mejawa, then to the Seping and from there to the Belaga, the Para in the Dapoi, and in the beginning of 1952 back to the Penyuen, a tributary of the Belaga, again where the Shin Yang camp is in that area.*
>
> *In 1967, Japi's group and Sugun's group split.* They had simply become too large. Urquhart described the group in 1950 as been comprised about 158 people which is a very large group. So in population there is probably something around 200 or more people in that group, simply too big for Penan group to maintain themselves. So, Japi's group moved toward the Belaga River where they eventually settled in the late 1960s at Long Kupang. *Sugun's group began moving toward the general direction of Long Jaik where in 1969 they made Lamin Jau at Long Teluna in the Jaik and in 1970 began planting ubi kayu and over the next few years they began moved generally down the Jaik in the Seping, Long Betian, Long Kepusong, Long Tekelah, the long house that I showed and eventually Long Be Kelio.* So this is the community of Long Jaik as I found it in 1984 showing Sugun's (audio not clear) ... of community of Long Jaik. (Emphasis added.)

[27] I have highlighted Professor Brosius evidence above which in my view shows that the Penan Geng were roaming around the areas within the rivers of Plieran, Seping, Penjuan (also spell as Penyen), Dapoi, Belaga. In his dissertation, the Penan of the Belaga District: Considerations for Development at p 20 of Tab K of exh P4, Professor Brosius has listed eight sub-groups of Penan Geng and the seven others, aside from that of Long Jaik are Long Kupang, Long Urun, Long Panan, Long Peran, Long Tangau, Long Luar and Long Wat. This evidence of his shows that the Penans of Long Jaik were not the only foragers of these huge area and corelates with the evidence of the three Tuai Rumah called by the company as mentioned by me earlier to show the probability that Sugun and his band of men only moved to their present location of the Seping River only in the 1960s and not earlier. Professor Brosius himself said so earlier at pp 22–23 of his dissertation as follows:

> To illustrate the nature of the relationship between historical relatedness and contemporary political relationships, we can consider the relationship of Long Jek to other Penan communities in the area. Between the communities of Long Jek and Long Kupang, there is a very close and friendly relationship. They formed a single community until about *1968*. They then split, with one group (Long Kupang) moving to the Belaga River, and the other group (Long Jek) moving to the Seping. There is frequent visiting between members of these two communities, despite the great distance between them. The basis of this relationship is largely kinship, and these links continue to be reinforced by the many marriages which occur between the members of these two communities. Though Penan in Long Jek frequently make disparaging remarks about other communities, one never hears such comments made with regard to Long Kupang. The relationship between Long Jek and Long Peran is of a very different nature. Despite their close proximity, the relationship between these two communities is very unfriendly. The source of this tension lies both in the more tenuous kinship connections between these communities, and in conflicting versions of who has valid claim to the upper Seping area.

[28] I have also no reason to discredit these Tuai Rumahs' evidence, particularly that Tuai Rumah of Long Peran that the area claimed as native customary rights by the plaintiff is also their tana' pengurip because when I examined the area shaded in yellowish highlighter on map 'M' by Professor Brosius during his testimony, it is indeed very close to Long Peran. This is the same for map 'P' attached to the amended statement of claim of the plaintiff. The plaintiff's father, Tugang ('PW5') gave the distance between these two longhouses as a mere two hours walk and the plaintiff himself said the journey by river is only an hour travel and by car, a mere ten minutes. Thus Professor Brosius is not wrong and I am entitled to conclude as the Professor said in his dissertation just produced above that there is 'close proximity' between the Penans of Long Jaik and Long Peran. Although as stated by the Professor and confirmed by these Penans themselves in the trial, there was no love lost between them.

[29] I need also to point out the evidence of Romy Pudong ('DW1') who was at the time of his testimony a senior draughtsman attached to the Forest Department of Sarawak and who prepared the map marked 'RPI' attached to his witness statement. He was shown the area edged in orange by Professor Brosius in map 'M' and he confirmed that the said area falls within the licensed area granted to the company. More importantly for my decision herein is his undisputed evidence that almost the whole area claimed by the plaintiff herein falls within the Belaga Protected Forest first extension which was constituted vide notification in the Sarawak Government *Gazette* on 18 July 2002. There were two earlier notifications on the constitution of Forest Reserve similarly *gazetted* ie on 21 March 198 and 16 January 1986. The said notifications appear in exh D2 ie the second and third defendant's bundle of documents. For the purpose of this judgment the First Schedule of the Belaga Protected Forest notification is relevant for it described the area declared as the Protected Forest and the Second Schedule listed the longhouses whose inhabitants have foraging or usufructuary rights over the said area. The notification of the earlier two protected forest ie Linau Protected Forest (Tab 7) and Danum Protected Forest (Tab 9) though covering also the area claimed by the plaintiff herein do not have the same Second Schedule. The said Second Schedule reads as follows:

SECOND SCHEDULE

The permanent inhabitants of the following longhouses shall have the rights to continue the traditional activities of fishing, hunting and collecting of jungle produce within the area for personal and domestic use only, but it shall be an offence to clear high forest except with the authority of the Director of Forests.

Rh. Sambop, Long Semutut, Belaga	Rh. Badang Menjawah
Uma Kunyah	Long Mabut
Long Urun, Belaga	Long Balo
Rh. Kolap, Long Sek	Long Dunin Tinjar Baram
Rh. Nyaving	Rh. Apan, Menjawah
Rh. Pg. Surat Kuja Long Bangan	Rh. Lahanan
Rh. Douglous Ding Jangan	Long Pangai
Rh. Kahei, Long Mekero	Rh. Beur, Long Sah
Rh. Bawang, Long Murum	Rh. Lesong Batu Keling
Rh. Kejaman Lasak, Segahan	Long Mitik
Rh. Badang, Long Aie	Rh. Juman, Long Dupah
Long Koyan	Rh. Dikan, Long Urun
Long Sivau, Urun	Long Apoh, Belaga
Rh. Sihan Ulu Sg. Amang	Long Ketuat Urun
Long Liko	Rh. Daro
Uma Nyaleng Pawah	

Made this 1st day of April, 2002.

DATUK PATINGGI TAN SRI (DR) HAJI ABDUL TAIB MAHMUD

Chief Minister and Minister of Planning and Resource Management

[30] The plaintiff's longhouse obviously is not mentioned in that Schedule and in the face of such evidence, it would not be right and I would even say inequitable and unjust to grant the declaration sought by the plaintiff for such an order would indirectly obliterate the written and acknowledged rights of the inhabitants of all these 31 longhouses, the competing claim of the Penans of Long Peran notwithstanding. Such an order, if given would definitely in my view violates the usufructuary rights granted to these named beneficiaries and which I am loathe to repeat, for these rights, with respect have been whittled when the licence to the company and earlier timber licences were issued over the same areas covered by the said First Schedule. The adjudication of this competing claim, I must further mention, from the evidence of both the plaintiff and the three Tuai Rumahs called by the company, should lie with the Native Court and which jurisdiction I would equally loathe to usurp. I also cannot rule out the legitimacy of that competing claim by the Penans of Long Peran because as I have mentioned earlier of the close proximity of Long Peran to Long Jaik, one at upper and the other at the lower Seping River and until their respective settlements, of the nomadic lifestyles of both these Penans. Furthermore, it is the plaintiff's own evidence that there are altogether *200* inhabitants of his longhouse now although the action is only filed on behalf of 42 others. It would again be unjust on my part to declare the whole approximately 44,744 hectares of area as demarcated in map 'P' claimed by the plaintiff (an area larger than Perlis and Malacca put together) for the benefit of just 200 or so inhabitants of Long Jaik when there are other Penans who have two roamed the same area.

[31] What is even more damaging to the plaintiff's case is the evidence in the Suhakam report itself at p 2 of exh P2 which reproduces a map on the Penan settlement from the article by Guy Ronald titled 'Longhouse and Jungle an Expedition to Sarawak (1959)'. The said map recorded the Penan settlement depicted on the map by the writer during his expedition, called the Oxford Expedition 195 and most interestingly, there was no such settlement found at the Jaik River or any along the Seping River where the expedition route was. For certainty, the title of the map in the Suhakam Report is 'MAP5: PENAN SETTLEMENTS FOUND DURING THE OXFORD EXPEDITION 1955'.

Other consideration: continuous occupation

[32] The Federal Court in *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 has held, in the words of Arifin Zakaria FCJ (as His Lordship then was) that there need not be actual

physical presence to show occupation of customary lands, that occupation can be had when there is sufficient measure of control preventing strangers from intrusion or interference.

[33] Jayl Langub was put this direct question in cross-examination that there was no continuous occupation by the plaintiff on the area claimed prior to the settlement at Long Jaik in the 1970s. His long and elaborate answer at p 358 lines 2 to p 360 lines 2 of the notes of proceedings is worth reproducing below even at the risk of adding length to my judgment because of certain key factors established therein which I will mention presently. The answer reads:

> A. It is a very complex story to tell. Let me start with the event in 1896, the Badeng community burnt the longhouse of the Lahanan people and this incurred the anger of Brooke Admin to send the force of 1000 or more than 1000 to Sungai Apau area, that include Seping, Plieran and this caused mass migration of Sebop, other Kenyah subgroups including the Badeng who caused the trouble to the Tinjar. At this period of time, the ancestor of the people of Lg. Jaik were residing on the Plieran, one bigger group of 13 lamin on the western side of the Plieran and a smaller number on the Eastern side of the Plieran. They also decided to run away from the expedition forces. The guys on the western side of the Plieran moved to the upper Tinjar, they moved into the Dapoi, Nivung and Lobang which are tributaries of Tinjar. The smaller groups comprising about 3 lamin moved into the Keluan, the true right bank of Linau River. Those who moved to the Tinjar, they stayed permanently and those moved to the Keluan, maybe they came back around 1920s to the Plieran and the Seping. These are descendants of Sinuveng: Uwing, Bajang, Pengisan. Uwing lived in the Seping River and Bajang and Pengisan in the Plieran. Pengisan died and he has two children: one of the Pengisan's son is Lawing and lived in Plieran and the other son, Usang lived in the lower Seping. As I mentioned earlier, after the separation of the two groups, the bigger group living at the western side moved to the upper Tinjar and the smaller group moved to Keluan and peace was restored. The group in Keluan moved back to Plieran and Seping. It was natural for the people in the group in the Keluan to visit their cousins in the upper Tinjar. We can understand that after separation, it is the period where the Penan were moving so that there was a urge to go visit relatives on the other side of the watershed, that is upper Tinjar. Movement between the upper Tinjar and what we generally know is Usun Apau. Usun Apau is a big area and it depends on who you talk to so that there is a constant movement of people visiting. Of course on the way, they will forage the area, they will stop on the way to look for food and they will come back to the place of their ancestorswhich they called Tana Puu' (ancestral land) and this Tana Puu' is Seping, Jaik and their tributaries. There were occasions that there were movements.

[34] In fact Jayl Langub himself also said in evidence that the Kenyah — another Orang Ulu tribe also inhabited Usun Apau Plateau (see p 157 line 1–18 of the notes of proceedings):

> Q. Is it correct to say that the Kenyah people occupied the Usun Apau Plateau before the Penans and this is evidenced by the remains of these people in the area?

A. The Kenyah groups in Sebop, they were living in longhouses. The Penans were moving around the area and there were a lot of interactions between the settled people and the nomad. The settled people left behind remnant of lousehouses. The Penans leave behind old camp sites known as la lamin. They leave la lamin behind in the forest and in their migration, they will come back to their old camp sites to build new camps because the site is where the food resources are. So, you have the settled group and nomadic groups and what they had is camp sites. Some camp sites would be noticeable because of fruit trees that grew in the camp sites from seeds of fruits eaten by their ancestors and the fruit trees will grow and they will know that they were planted by their ancestors. The fruit tree is Saka buah. That is the possible trace you see nomadic groups left behind.

[35] In this regard, I would also like to refer to a map in Professor Brosius report to Suhakam ie at p 169 of the Suhakam report which is reproduced in exh P36 under the title 'Long Jaik Settlement Sequence 1928 to 1987'. This map most importantly shows the sites of the lamins and the rivers in Belaga and equally important is the fact that it is titled 'Sites associated with Penan Geng Belaga including the Shin Yang Forest Plantation'. First, what is pretty obvious from the map is that the sites of the lamins are mostly in the licensed area and occupy a large portion of the said area. Secondly, it reflects as shown by the title to the map that contrary to the title of exh P36, these lamins are not just that of the Penans of Long Jaik but that of the 'Penan Geng Belaga'. Therefore even if one or rather I could discount the evidence above that the Kenyahs were foraging the area claimed together with that of the Penans of Long Jaik, I could not in all fairness say the same for the other groups of the Penan Geng of Belaga and this strengthens my conclusion, unfortunate it is that the Penans of Long Jaik have failed to discharge the burden of proving that they have native customary rights over the area claimed in either map 'M' or 'P'.

[36] In other words there is inherent probability that the plaintiff did not have the exclusive possession of the area claimed to put in place a 'measure of control preventing strangers from intrusion or interference' as held in *Madeli*'s case so as to be entitled to the declaration sought that the whole area claimed by them is their native customary rights land. I arrived at this conclusion without calling in aid the Rajah Order 187 quoted in *Madeli*'s case because it is in my view not applicable to the nomadic Penans since the substance of that order is abandonment of jungles cleared by the natives. As reproduced in the said judgment, the order reads as follows:

Whereas it is a common practice among the native community to make *large clearings of old jungle and afterwards abandon them*, I direct that should*any clearance of the kind be made in the future*, and the persons who *cleared the ground* allow the same to go uncared for, they will lose all claim or title to such land; (Emphasis added.)

[37] For all the above reasons I am constrained to hold that the plaintiff and

those he represents have failed to discharge the burden of proving that the area claimed by him as shown in map 'M' or 'P' of the amended statement of claim is their tana' pengurip acquired by them before 1 June 1958.

ALTERNATIVE VIEW

[38] If I were wrong in making that finding on the considerations of the above evidence and on the assumption that the said legal burden has been discharged, I would be moved to make the declaration that the plaintiff has native customary rights over the area claimed but not that as depicted in map 'M' or 'P'. But before giving the reason why I would pause first to mention about the size of the area claimed.

SIZE OF THE AREA CLAIM

[39] I had earlier mentioned that the size of the area claimed by the plaintiff is 44,774 hectares. I obtained that figure from Stephen Ling's evidence as depicted in the map marked Appendix D to his witness statement. This acreage he was able to obtain by overlaying the plaintiff's map 'P' with the 1951 aerial photograph of the locality in 1951 and 1963 which are appendix D and E to his witness statement. In his earlier report dated 14 March 2011 which is Tab 10 to exh D2, Stephen Ling had estimated the area claimed as approximately 324,744 hectares and this is shown in the maps he annexed to that report as appendix A and B. The difference in the acreage was because the area claimed has been amended from that shown in map 'M' to that shown in map 'P'.

[40] The reason for my rejection of the plaintiff's maps is firstly the undisputed evidence that the ones who did the ground survey ie Anyeh and others such as Pawi Ajang, Alex Tugang and Nyaban Pawi and the one who drew the map, named by the plaintiff as Matek Geluma, were not called as witnesses at the trial. Whilst I have no reason to doubt the competency and skill of Professor Nathan Nibblelink ('PW2') who produced map 'P' attached to the amended statement of claim, it was still based on map 'M'. Both Ms Jagjeet Kaur and Mr Saferi Ali have also pointed out in their written submissions that the maker of these two maps, witness or nonwitness are not licensed or registered surveyors under the Land Surveyors Ordinance 2001 and therefore the maps produced at the trial cannot be relied on.

[41] This issue of unlicensed/unregistered surveyors have been litigated before and the opinions of judges/JCs hearing native customary rights cases on it are divided. I maintain the view I held in *Nicholas Mujah Ason & Ors v Hock Tong Hin Sawmill Co Bhd & Ors* [2012] 1 CLJ 749 and in *Buassan & Ors v Entrep Resources Sdn. Bhd & Ors* (Suit No KCH-22–199/10 of 2011) that such a map is inadmissible. The contrary view held in *Sanabung ak Sampai & Ors v*

Hydroflow Sdn Bhd & Ors [2014] 7 MLJ 429 and *Director of Forest, Sarawak & Anor v Tr Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, the occupiers, holders and the claimants of native customary rights (NCR) lands situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak)* [2014] 1 MLJ 161 is that since the map was not required for submission to the Land Office, the same is not rendered inadmissible by the non-registration of its maker.

[42] My second reason is, that as stated earlier the different sizes of the area claimed in map 'M' and map 'P' which differences, unexplained by their maker, made it unwise for me to take one and not the other.

RELIABLE MAP

[43] The map I would be able to rely on to make the declaration would be that map produced in the final report. That map appears at p C6-4 and marked as figure 6.1 in the final report and what is stated in the said report at p C6-2 is relevant and is produced below:

> *While the Western Penan did not claim land in the manner of the other tribes (i.e by felling forest for planting rice) they are nonetheless acutely aware of the extent of the area that they and their ancestors have exploited over the years. The scope of this territory is identified through detailed knowledge of the landscape, the names of the features and the events and resources linked to these geographical points. Figure 6.1 outlines the general territories recognized by the various Western Penan communities.* (Emphasis added.)

[44] What is reproduced and emphasised above and corroborated by the undisputed evidence of the Penan's lifestyle, ie sustenance by foraging in the jungle is a complete answer to the second and third defendants' evidence that the aerial photograph taken of the area claimed by the plaintiff in 1951 was primary forest and therefore, according to them is evidence against usage of the said area by the plaintiff. In my view, when such traditional usage of the area claimed by plaintiff does not involved cultivation of land, such a defence is, with respect rather misplaced. The aerial photograph for the record was given by Stephen Ling Jin Huat ('DW1') who at the time of trial holds the post of an assistant surveyor with the Department of Lands and Surveys. The aerial photograph is marked Appendix A to his report which is Tab 10 to exh D2.

NON-CODIFICATION OF TANA PENGURIP

[45] I would rely on the same passage highlighted above and that interview with Penghulu Pau Tului from the final report which I have reproduced earlier to corroborate the evidence of the plaintiff, his father, PW6 Professor Brosius and Jayl Langub on the Penan's customary practice of territorial domain or land tenure ie *tana pengurip despite*, as submitted by the defendants' counsels, the

absence of such a custom in the codified *Adat* (or Adet) Penan. Furthermore, the Tuai Rumah of Long Peran himself as did the other two Tuai Rumah who were his co-witnesses confirmed of such customary land practice of the Penans, otherwise there would not be such allegation of encroachment by the Penans of Long Jaik into Long Peran's foraging area. It therefore does not lie in the mouth of those who knew the background of the Penans such as the defendants herein to deny the existence of such a customary land practice. This I say especially to the Director and the State Government who must be aware of the final report and its content. Further, the Federal Court in *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 6 CLJ 805 has held that the creation of native customary land and rights acquired by a native of Sarawak is conditional upon the adherence to custom and common practice of his community and by the evidence mentioned above such a land custom and practice have indeed been proven in this case.

FURTHER ALTERNATIVE VIEW

[46] There is another map I could rely on to declare the boundaries of the plaintiff's native customary rights land on the assumption that the map in the final report does not represent a true reflection of the same. That map is in the Suhakam report (exh P2) but before that I need to give an introductory background to it. The said map was attached to the letter of the plaintiff dated 22 June 2005 addressed to Dr Mohd Hirman Ritom, a Commissioner of Suhakam ie Human Rights Commission of Malaysia. That letter, written in Bahasa Malaysia is at p 82 of the Suhakam Report and its translation in English was provided at the trial although I must confess in the arduous process of the trial, there was an omission to mark it and for which I take full responsibility. In it the plaintiff pleaded for help to protect their 'forest land reserve area' and said the area they wanted to protect is as per the map attached. It is not disputed that the map was drawn by one Ted Maclin who was was a student of Professor Brosius at that material time. Ted Maclin, however was not as a witness at the trial.

[47] After the plaintiff has closed his case I have asked parties to submit on the size of the area claimed by the plaintiff as shown in this map as it is pertinent evidence of the size of the area claimed, being the earliest recorded evidence of the same. The defendant's witness, Stephen Ling ('DW2') reproduced the map and tendered it as Appendix F to his witness statement and it shows the acreage of the area claimed as 1944 hectares approximately — that claimed in this case as stated earlier was 324,744 hectares (in map M) and 44,774 hectares (in map P) approximately. Professor Nathan also reproduced the Suhakam map and it was shown to Stephen Ling during his cross-examination by Mr See Chee How. The same were tendered as exh P44(A) to (D) after I overruled the defendants' counsels objections to them because the maker was not there to

tender it. My reason for allowing the maps to be tendered is because the reproduction was at my instruction and it would entail much time and expenses to recall Professor Nathan from United States of America just to tender them. In these maps, especially exh P44(A), (B) and (C) which depicts the same rivers drawn in the Suhakam map, Professor Nathan also showed the relative size of the area in the Suhakam map with that claimed in this case. In the legend of the said maps this is described as 'Customary lands submitted 2015'. The size of the area claimed by the plaintiff in the Suhakam map is definitely much smaller. The unfortunate thing though is Professor Nathan did not go to the extent of estimating the size of the area claimed in the Suhakam map. I am persuaded, after I compare Appendix F of Stephen Ling with exh P44(A) to (C) of Professor Nathan that Appendix F is a more reliable evidence for me to rely on given that it depicts the overall locality of the area claimed by the plaintiff in the Suhakam map as well as that in map 'M' and 'P'. The depiction appears to my eyes, untrained it maybe, to be a correct representation of the area claimed because even the shape of the area claimed in Appendix F is of the same shape as shown in both map 'M' and 'P'. Thus, I would be emboldened by this finding to use Appendix F to declare that the plaintiff has native customary rights over the area claimed in the final report.

LIMITATION

[48] I need to make a cursory mention that the second and third defendants have pleaded limitation under s 2(a) of the Public Authorities Protection Act 1948 as a defence in para 9 of their statement of defence but this issue was not addressed in Mr Saferi Ali's final submission nor was it ever raised with any of the witnesses, either called by the plaintiff or the defendants. I take it that the same has been abandoned but out of deference to the inclusion of the said issue in Mr See Chee How's written submission in reply to Mr Saferi Ali's written submission, I would make this simple observation. I agree totally with Mr See Chee How that the defence of limitation fails on account of the ratio in the Federal Court's case of *Director Of Forests, Sarawak & Anor v Balare Jabu & Ors and another appeal* [2012] 7 CLJ 685 when Richard Malanjum FCJ (as His Lordship then was) held the respondent's claim for native customary rights over an area covered by a forest licence issued by the appellant in that case falls under the second limb of s 2(a) of the said Act ie 'the case of a continuance of injury or damage'. Therefore, said His Lordship further as long as the licence remains valid, it was subject to the respondent's native customary rights. It is clearly seen from the reproduction of the licence issued to the company in this case before me at p 1 of exh D1 (the company's bundle of documents) that the licence was issued on 19 November 1999 and will only expire on 18 November 2059. So based on *Balare Jabu*'s case the defence of limitation fails.

COSTS

[49] Despite the dismissal of the plaintiff's claim, I have decided not to award cost to any of the defendants because had the defendants been forthright about and conceded the evidence in their possession such as the various articles on the Penans of Belaga published in the Sarawak Government *Gazette*, that of the final report as well as the Suhakam report which they (especially the state government) must be aware of, much of the evidence pertaining to the plaintiff's customary land practice could have been agreed upon. This would have substantially reduced trial time and the expense of adducing these evidences during the trial.

Plaintiff's claim dismissed with no order as to costs.

Reported by Kohila Nesan